

Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd**A**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-332 OF 1995

SHAIK DAUD, SITI NORMA YAAKOB AND ABDUL MALEK AHMAD JJCA
22 OCTOBER 1996**B**

Civil Procedure — Damages — Assessment of damages — Application for specific performance of sale and purchase contract abandoned after reimbursement of part payment sum — Whether amount to consent to be liable to damages — Claim for breach of agreement; whether merely an alternative claim

The appellant and respondent had entered in to a sale and purchase agreement for the sale of some parcels of land. Following this, the respondent made part payment of a sum of RM136,000 to the appellant. The respondent also agreed to pay a certain sum to the appellant subject to the removal of a certain condition 2 (which contains certain impediment on the lands) appearing in all the issue documents of title. Subsequently, the respondent was prompted to file a summons-in-chambers for specific performance against the appellant upon the latter's refusal or failure to remove the above mentioned condition 2 from the issue documents of title. In their application, the respondent also prayed, *inter alia*, for damages for delay in handing over possession of the lands and that the senior assistant registrar be directed to assess damages for breach of contract. At the hearing of the application, the prayer for specific performance was abandoned after the appellant reimbursed the RM136,000, and upon this the judge made an order directing the senior assistant registrar to assess the damages. The appellant appealed.

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Held, allowing the appeal:

(1) The learned judge erred in law in ordering the assessment of damages. He appears to have misconstrued the appellant's repayment of the RM136,000 and the consent to the abandonment of the prayer for specific performance by the respondent as being consent to be liable for damages. He also appears to have ignored the appellant's statement of defence and affidavit in reply where the appellant had explained why the impediment to condition 2 was not removed and that this explanation had not been disputed by the respondent (see p 313A-C).

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(2) The essence of the respondent's claim is for specific performance and the claim for damages for breach of agreement must necessarily be regarded as an alternative claim. They cannot get both remedies. Once they abandon this claim, they have altered their claim and their pleadings cannot stand for the purpose of their alternative claim for damages for breach. They therefore ought to amend their pleadings and without doing so, the learned

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- A judge ought not to have ordered damages to be awarded to them (see p 313E–G).

[Bahasa Malaysia summary]

- B Perayu dan responden telah memasuki suatu perjanjian jual-beli untuk jualan beberapa bidang tanah. Berikutan ini, responden membuat pembayaran sebahagian suatu jumlah sebanyak RM136,000 kepada perayu. Responden juga bersetuju untuk membayar jumlah tertentu kepada perayu tertakluk kepada pengalihan syarat 2 (yang mengandungi halangan tertentu ke atas tanah-tanah) yang tertera di dalam semua dokumen hakmilik.
- C Kemudian, responden telah digerakkan untuk memfailkan saman-dalam-kamar untuk pelaksanaan spesifik terhadap perayu di atas keengganan atau kegagalan perayu untuk mengalihkan syarat 2 di atas daripada dokumen-dokumen hakmilik. Di dalam permohonan mereka, responden telah memohon antara lain, untuk ganti rugi bagi kelewatan di dalam menyerahkan milikan tanah-tanah tersebut dan bahawa penolong kanan pendaftar diarahkan untuk menaksirkan ganti rugi bagi pelanggaran kontrak. Semasa perbicaraan permohonan mereka, permohonan untuk pelaksanaan spesifik telah diketepikan selepas perayu memulangkan RM136,000 dan di atas ini hakim membuat perintah mengarahkan penolong kanan pendaftar untuk menaksirkan ganti rugi. Perayu telah merayu.
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Diputuskan, membenarkan rayuan tersebut:

- F (1) Hakim yang arif telah silap di dalam undang-undang di dalam mengarahkan penaksiran ganti rugi tersebut. Beliau dilihat sebagai telah salah tafsir pembayaran semula RM136,000 oleh perayu dan persetujuan untuk pengetepian permohonan pelaksanaan spesifik oleh responden sebagai persetujuan untuk dijadikan bertanggung untuk ganti rugi. Beliau juga dilihat sebagai mengetepikan pernyataan pembelaan perayu dan affidavit jawapan di mana perayu telah menjelaskan mengapa halangan kepada syarat 2 tidak dialihkan dan bahawa penjelasan ini tidak dipertikaikan oleh responden (lihat ms 313A–C).
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- H (2) Asas tuntutan responden adalah bahawa pelaksanaan spesifik dan tuntutan untuk ganti rugi bagi pelanggaran perjanjian mestilah dianggap sebagai alternatif kepada tuntutan tersebut. Mereka tidak boleh mendapat kedua-dua remedi. Selepas mereka mengetepikan tuntutan ini, mereka telah mengubah tuntutan mereka dan pliding-pliding mereka tidak boleh bertahan bagi tujuan tuntutan alternatif untuk ganti rugi pelanggaran. Dengan itu, mereka patut meminda pliding-pliding mereka dan tanpa berbuat demikian, hakim yang arif tidak patut mengarahkan ganti rugi diawardkan kepada mereka (lihat ms 313E–G).]
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Notes

For cases on assessment of damages, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1484–1485.

Cases referred to

Hipgrave v Case (1885) 28 Ch D 356 (refd)

Legislation referred to

Rules of the High Court 1980 O 37, O 81

Appeal from: Civil Suit No 22–456 of 1993

C Kumaresin (Saga & Associates) for the appellant.

Gana Muthusamy (Gana Muthusamy & Co) for the respondent.

Shaik Daud JCA (delivering judgment of the court): This is an appeal from the decision of the High Court sitting in Johor Bahru which had ordered the learned senior assistant registrar to assess damages allegedly suffered by the respondent for an alleged breach of a sale and purchase agreement by the appellant. The facts leading to this order being made are not in dispute. By a sale and purchase agreement dated 8 February 1992 the appellant as the beneficial proprietor of some parcels of land in the Mukim of Tebrau, Johor Bahru, agreed to sell the said lands to the respondent at an agreed sum of RM1,709,072.50. The respondent made part payment of a sum of RM136,000 to the appellant. The respondent also agreed to pay a sum of RM629,228.90 on or before 31 January 1993 subject to the removal of condition 2 appearing in all the issue documents of title. This condition states 'the said property shall not be capable of being transferred or charged until the buildings have been duly erected and completed in accordance with the building plans approved by the appropriate authority.' Under the sale and purchase agreement the respondent undertook to pay the balance of the purchase price of RM821,843.70 within one year from the date of the last payment.

The respondent, after having paid the initial RM136,000, were at all material times ready, able and willing to complete the agreement and towards this end lodged a caveat over the said lands. Despite several requests and demands, the appellant refused or failed to have the above mentioned condition removed from the issue documents of title and consequently this refusal or failure prevented the respondent from completing the agreement. This prompted the respondent to file a summons-in-chambers for specific performance of the agreement against the appellant under O 81 of the Rules of the High Court 1980. In their application the respondent prayed inter alia for specific performance, damages for delay in handing over possession of the lands and the senior assistant registrar be directed to assess damages for breach of contract pursuant to O 37 of the Rules.

At the hearing of the application in chambers, learned counsel for the respondent decided to abandon the respondent's prayer for specific

- A performance, after the appellant reimbursed the RM136,000. In the light of this, what is left is the prayer for damages for breach of contract which is to be assessed by the senior assistant registrar.

- B Immediately after the learned counsel for the respondent informed the court of the respondent's desire to abandon the prayer for specific performance, the learned judge, without hearing the matter further on the merits, made an order directing the senior assistant registrar to assess the damages. By doing this it would appear that the learned judge assumed, *without hearing any evidence on merits*, that the appellant was liable for breach of the agreement. On our perusal of the judgment of the learned judge, it seems clear that the learned judge treated the matter as a *consent judgment*
- C in that by repaying the RM136,000, the appellant had consented to the prayer for damages for breach of the agreement. The learned judge appeared to have ignored the appellant's statement of defence and affidavit in reply where the appellant had explained why the impediment to condition 2 was not removed and that this explanation had not been disputed by the respondent and thereby they had accepted the explanation.
- D It is clear that the appellant's defence *had raised triable issues* as to whether they had breached the agreement. It would also appear that the learned judge misconstrued the appellant's consent to the abandonment of the prayer for specific performance by the respondent as being consent to be liable for damages.

- E The essence of the respondent's claim in the circumstances of this case is for specific performance and the claim for damages for breach of agreement must necessarily be regarded as an alternative claim. They cannot get both remedies. If they claim for *specific performance*, they are treating the agreement as still subsisting and wants the other party to perform it. If their claim is for *damages for breach*, they are treating the agreement as having come to an end and therefore incapable of being performed. As stated earlier the essence of the respondent's claim is for specific performance and once they abandon this claim, they have altered their claim and their pleadings cannot stand for the purpose of their alternative claim for damages for breach. They therefore ought to *amend*
- F their pleadings and without doing so, the learned judge ought not to have ordered damages to be awarded to them. The respondent cannot be allowed to *change the whole nature of their claim* which essentially is a claim for specific performance, by turning it into an ordinary action for damages. (See *Hipgrave v Case* (1885) 28 Ch D 356).
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- H In the circumstances of this case, we are of the view that the learned judge erred in law in ordering the assessment of damages. We accordingly allowed the appeal with costs, set aside the order of the learned judge and ordered the deposit to be refunded to the appellant.

Appeal allowed.